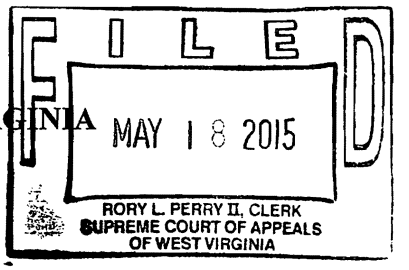

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 14-1328 and Docket No. 14-1329
(Consolidated)

Estate of Luigi Bossio a/k/a Louis Bossio,
Defendant Below, Petitioner,

vs.) No. 14-1328

Bernard V. Bossio, Plaintiff Below, Respondent.

AND

Sam Bossio, Defendant Below, Petitioner,

vs.) No. 14-1329

Bernard V. Bossio, Plaintiff Below, Respondent.

RESPONDENT'S BRIEF

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II. STATEMENT OF THE CASE

Petitioners are asking this Court to retry the evidence in the record because they are unhappy with the supported and well-reasoned decision issued by the Honorable Russell M. Clawges, Jr. The Circuit Court properly found that the shareholders of Bossio Enterprises, Inc. (the "Corporation") signed the Stock Purchase Agreement (the "Agreement") in 1982 and also executed a revised Agreement in 1990. Simple disagreement with the trial court's ruling is not a justified ground to reverse. Because the Circuit Court did not abuse its discretion or commit clear error, this Court should affirm the Trial/Judgment Opinion Order.

A. History of the Corporation

The Corporation was formed on March 30, 1979. (APP. 192-196; Respondent Ex. 1). It is undisputed that Respondent Bernard V. Bossio ("Respondent"), Petitioner Sam Bossio ("Petitioner Bossio"), and Luigi Bossio a/k/a Louis Bossio ("Luigi Bossio") each owned ten (10) shares of the Corporation. (*Id.*). Luigi Bossio was the father of Respondent and Petitioner Bossio. (APP. 037, 474-475).

The Corporation began when Luigi Bossio, at the suggestion of Respondent, purchased Mario's Pizzeria in Morgantown. (APP. 036, 475). The Corporation grew by purchasing new pizza shops, franchising pizzerias, and acquiring real property throughout Morgantown and Westover. (APP. 038-039, 475). The Corporation eventually sold all of its pizza shops. (APP. 040, 154). Luigi Bossio's main responsibility was making dough when the pizzerias were operational, and he retired from the Corporation when the last shop was sold in 2002. (APP. 041, 152, 155-156).

Today, the Corporation's primary function and value is its ownership of residential and commercial real estate. (APP. 040-041, 155, 475). Petitioner Bossio is responsible for

accounting and collecting deposits for the Corporation's rental properties. (APP. 043, 156). Respondent, a licensed contractor, is in the field handling construction and maintenance issues for the Corporation's properties. (APP. 035, 043). The Corporation's shareholders signed the Stock Purchase Agreement (the "Agreement") in 1982 and also executed a revised Agreement in 1990, which required the estate of a deceased shareholder to sell its shares back to the Corporation upon death. (APP. 474-480).

Luigi Bossio died testate in 2007, and his ten (10) shares are not specifically mentioned in his will. (APP. 320-332, 475). Respondent had no choice but to file this lawsuit after the Estate of Luigi Bossio ("Petitioner Estate") refused to sell its shares back to the Corporation as required by the Agreement. (APP. 474-480). While Petitioners deny that the signed Agreement existed, Judge Clawges found otherwise based upon the substantial evidence submitted to the Circuit Court. (*Id.*).

B. The Corporation's shareholders signed the 1982 Stock Purchase Agreement.

Joseph Marshalek ("Mr. Marshalek"), a disinterested witness and certified public accountant, became an employee of the Corporation in July 1982. (APP. 042, 104, 475-476). He was hired as the Corporation's treasurer, chief financial officer, and handled the Corporation's accounting, taxes, and corporate formalities. (APP. 042-044, 104). He also reviewed and drafted documents of a legal and corporate governance-related nature. (APP. 104, 475-476). He stopped working at the Corporation in 1993. (APP. 106).

Based on its growth and success, the Corporation's shareholders discussed the need for an Agreement to satisfy concerns over piercing of the corporate veil, succession, and to guide the Corporation for future growth. (APP. 045, 049, 157). Petitioner Estate's Brief concedes that the intent of the shareholders "was to preclude the possibility that their business could be controlled

by a spouse." (*See* Petitioner Estate's Brief, p. 14).

Respondent testified that Mr. Marshalek raised the need for the Corporation to have an Agreement in place shortly after he was hired in July 1982. (APP. 045). While Mr. Marshalek did not recall if a buy-sell arrangement existed when he was hired, he testified that he would have likely suggested such an agreement be executed for purposes of transition and business continuation upon the death of a shareholder. (APP. 106-107).

The 1982 Agreement was drafted by Attorney David Straface. (APP. 048, 476). Respondent testified that the Agreement was signed by Respondent, Petitioner Bossio, and Luigi Bossio at the Corporation's offices in 1982 (the "1982 Agreement"). (APP. 046-047, 476). While he could not recall the specifics of when and where the 1982 Agreement was signed, Mr. Marshalek likewise testified that the 1982 Agreement was signed by all three (3) shareholders in the fall of 1982. (APP. 111-112, 128, 130, 476). Respondent witnessed all three (3) shareholders sign the 1982 Agreement. (APP. 047, 476). A signed copy of the 1982 Agreement has not been located, but a copy of the 1982 Agreement was introduced into evidence. (APP. 197-208; Respondent Ex. 2).

After the 1982 Agreement was signed, it was placed in a manila folder that had the words "Buy-Sell Agreement" written on the tab and placed in the company's safe located in the Corporation's office. (APP. 059, 285, 476-477; Respondent Ex. 8).[1] Mr. Marshalek testified that the "Buy-Sell Agreement" handwriting on the manila folder was his, and that he would have placed the executed 1982 Agreement into that folder. (APP. 116, 476-477; Respondent Ex. 8).

The 1982 Agreement itself also had handwritten notes on it, which Mr. Marshalek identified as his too. (APP. 108; Respondent Ex. 2). He further testified that those notations

[1] The original, legal-size manila folder was admitted into evidence and remains in the Circuit Court's possession as Respondent's trial exhibit 8. A copy of the manila folder has been reproduced at App. 285.

were his review notes for points of discussion or clarification with the Corporation's shareholders. (APP. 109). Respondent testified that, aside from changing the address, the 1982 Agreement introduced into evidence at trial was the agreement signed by all of the shareholders in 1982. (APP. 048, 197-208; Respondent Ex. 2).

On the other hand, Petitioner Bossio testified that it was possible that he signed the 1982 Agreement. (APP. 163). While he did not have a specific recollection, he did admit that he could have signed the 1982 Agreement. (*Id.*). Petitioner Bossio further testified that he did not get involved in the legal details and minutia of the Corporation and even stated that, in 1982, he "probably was too tired to even listen." (APP. 160-161, 166-167). He let legalese go in one ear and out the other. (APP. 161). Even though it was requested in discovery and the main point in this lawsuit, Petitioner Bossio testified that he has never even looked for the signed 1982 Agreement. (APP. 169).

Antoinette Bossio Summers, who testified as the executrix for Petitioner Estate, heard "buy-sell" in the background at Sunday family dinners. (APP. 176). Otherwise, Petitioner Estate had no involvement with the Corporation or knowledge whatsoever regarding the 1982 or 1990 Agreement. (APP. 178, 183).

In addition to the testimony of Respondent and Mr. Marshalek that the 1982 Agreement was signed, the trial court relied upon various pieces of direct evidence in finding that the 1982 Agreement was valid and executed. (APP. 476-477). First, the 1982 Agreement required the Corporation to purchase three (3) separate insurance policies for $100,000 on each of the shareholders in order to help fund the Corporation's purchase of the deceased shareholder's shares. (APP. 199-201, 475-477; Respondent Ex. 2). The 1982 Agreement contained a "Schedule of Life Insurance Policies," and the Schedule indicated that the policies would be

purchased through Equitable. (APP 208; Respondent Ex. 2). The 1982 Agreement listed specific policy numbers for Respondent (82-396-966), Petitioner Bossio (82-396-435), and Luigi Bossio (82-395-874). (*Id.*; APP. 475).

Respondent, Petitioner Bossio, and Mr. Marshalek all testified that those exact policies were purchased by the Corporation. (APP. 054-055, 113-115, 164-165). The Corporation made its first payment on the Equitable life insurance policies in the last quarter of 1982. (APP. 113-114, 477). Policy statements from Equitable were admitted as evidence showing that Luigi Bossio's policy was purchased on September 30, 1982, and Petitioner Bossio's policy was purchased by October 1, 1982. (APP 209-214; Respondent Ex. 3). Additional policy statements from Equitable were admitted demonstrating that the Corporation purchased the exact life insurance policies with the same policy numbers as required by the 1982 Agreement. (APP. 209-253, 477; Respondent Ex. 3). On September 26, 1990, Mr. Marshalek wrote a letter to Equitable to advise that all three (3) policies had become paid-up policies. (APP. 115, 251, 477; Respondent Ex. 3).

Mr. Marshalek also testified that the insurance was paid for by the Corporation on a monthly basis to fund the Corporation's buy-sell agreement. (APP. 113, 126). He also stated that the life insurance premiums were not deductible by the Corporation and were treated as a reconciling item on the Corporation's tax returns from 1982 through, at least, 1989. (APP. 114, 126-127).

Further evidencing that the 1982 Agreement was signed, the Corporation also transferred all of its real property from the individual shareholders and their spouses into the name of the Corporation itself. (APP. 290-294; Respondent Ex. 11). The October 7, 1988 Deed documenting this transfer was recorded in Monongalia County on October 14, 1988. (*Id.*). In

the Deed, the spouses of the individual shareholders, including Luigi Bossio's wife, conveyed "any and all interest, including any dower interest, they have in the above-described property to the [Corporation]." (APP. 293; Respondent Ex. 11). Respondent testified that this was done to guarantee that there would be no question that the Corporation's real estate belonged to the Corporation and any rights of survivorship were being disclaimed. (APP. 071). The Deed is consistent with the admission in the Petitioner Estate's Brief that the intent of the shareholders "was to preclude the possibility that their business could be controlled by a spouse." (*See* Petitioner Estate's Brief, p. 14).

C. The 1982 Stock Purchase Agreement was revised in 1990 and signed by all of the Corporation's shareholders.

In 1990, Respondent, Petitioner Bossio, and Luigi Bossio (along with 2 others) formed a separate company, B.H.M. Development Corporation, Inc. ("BHM Development"). (APP. 061-062, 158). BHM Development executed a Stock Redemption Agreement in 1990 (the "BHM Agreement"). (APP. 254-265; Respondent Ex. 4). The executed BHM Agreement is essentially identical to the Corporation's 1982 Agreement. (*Compare* APP. 197-208, 254-265; Respondent Exs. 2 and 4).

Respondent testified that Mr. Marshalek pulled the Corporation's 1982 Agreement to use as a reference for drafting the BHM Agreement in 1990. (APP. 061-062). In reviewing the 1982 Agreement, Mr. Marshalek determined that it required updates to meet the Corporation's current needs as it had cash flow problems and had borrowed against the life insurance policies for operating cash. (APP. 060-062, 477). The mandatory purchase of life insurance provision in the 1982 Agreement was removed and replaced with a discretionary option to purchase life insurance for each of the shareholders. (APP. 063, 480, 531-532). Attorney David Straface ("Attorney Straface") testified that he revised the Corporation's 1982 Agreement in 1990. (APP.

136).

The revised 1982 Agreement was signed by Respondent and Petitioner Bossio in the Corporation's offices at 12 Monongahela Avenue in October 1990 (the "1990 Agreement"). (APP. 063-064; Respondent Ex. 6). Respondent then took the 1990 Agreement to Luigi Bossio's home and witnessed Luigi Bossio sign the 1990 Agreement at his basement dining room table. (APP. 064, 478). The signed 1982 Agreement and 1990 Agreement were then placed in the manila folder and into the Corporation's safe. (APP. 064, 285, 478; Respondent Ex. 8).

After this lawsuit was filed, Respondent went to the safe located in the Corporation's office to retrieve the signed 1990 Agreement. (APP. 068). However, both the 1982 and 1990 Agreements were gone, and the only thing in the safe was the empty manila folder with the words "Buy-Sell Agreement" written on the tab. (APP 068, 285, 479; Respondent Ex. 8).[2]

Attorney Straface's handwritten notes on the top of 1990 Agreement indicated that he absolutely revised the 1990 Agreement. (APP. 136, 272-283; Respondent Ex. 6). While he did not receive a signed copy of the 1990 Agreement back from the Corporation, Attorney Straface testified "that was not unusual" as his firm did a lot of things for the Corporation in the late 1980s and early 1990s. (APP. 134-135, 137, 478). He also testified that he had no reason to believe that the 1990 Agreement was not signed by the Corporation. (APP. 137).

The Circuit Court also relied upon additional pieces of documentary evidence in finding that the 1990 Agreement was valid and executed. (APP. 474-480). Both the 1982 and 1990 Agreement required the Corporation's stock certificates to be endorsed as follows:

> This certificate is transferable only upon compliance with the provisions of an agreement dated _____, 19__ among Bossio Enterprises, Inc., Louis Bossio, Sam Bossio and Bernard Bossio, a copy of which is on

[2] When asked on cross-examination where the signed Agreements would have been kept, Petitioner Bossio testified (unsolicited) that many people had access to the safe, including himself and a former employee who stole $50,000 from the Corporation. (APP. 163-164).

file in the Office of the Secretary of the Corporation.

(APP. 201-202, 276-277; Respondent Exs. 2 and 6 at Section 6).

Introduced into evidence were the Corporation's stock certificates issued to Respondent, Petitioner Bossio, and Luigi Bossio. (APP. 266-271, 478; Respondent Ex. 5). On the back of each stock certificate, the following endorsement is typewritten:

> This certificate is transferable only upon compliance with the provisions of an agreement dated 10-1-90, among Bossio Enterprises, Inc., Louis Bossio, Sam Bossio and Bernard Bossio, a copy of which is on file in the Office of the Secretary of the Corporation.

(APP. 266-271, 478; Respondent Ex. 5). The Corporation's stock certificates were endorsed with the exact language as required by the Agreement. (APP. 266-283, 478; Respondent Exs. 5 and 6). Respondent requested the stock certificates in discovery. (APP. 068-069). After Petitioner Bossio produced just the fronts of the certificates on two (2) separate occasions, the fronts and backs of the stock certificates (with the endorsements) were eventually produced by Petitioner Bossio during this lawsuit. (APP. 068-069, 479; Respondent Ex. 5).

In addition to the stock certificates, the trial court relied on more evidence to support its findings. (APP. 474-480). The 1990 BHM Agreement and the Corporation's 1990 Agreement contain identical substantive language. (*Compare* APP. 197-208, 254-265; Respondent Exs. 2 and 4). Respondent and his wife also divorced in 1991, and he was represented by Attorney Straface. (APP. 123, 138). The value of Respondent's shares in the Corporation was an issue during those proceedings. (APP. 123). In response to a subpoena, Attorney Straface produced some of his handwritten notes taken while representing Respondent in his divorce. (APP. 138-139, 284, 478-479; Respondent Ex. 7). The handwritten notes stated, "Buy Sell K" and "Ins = 100,000.00." (APP. 284; Respondent Ex. 7). Those notes referred to the existence of the Corporation's 1990 Agreement and the $100,000 life insurance policies that had been purchased

by the Corporation. (APP. 139, 479). On October 17, 1991, the "buy/sell agreement for [the Corporation]" was also requested in discovery by the attorney representing Respondent's former wife. (APP. 140, 288-289, 479; Respondent Ex. 10).

Mr. Marshalek also testified that he was involved in Respondent's divorce in 1991 while he was still employed by the Corporation. (APP. 106, 123, 478). He assisted Respondent in determining the value of his shares of stock in the Corporation. (APP. 123, 286-287, 478; Respondent Ex. 9). Mr. Marshalek's handwritten notes, dated September 24, 1991, referred to the "Buy Sell 100,000 for BB, Sam & Louis." (*Id.*). Mr. Marshalek testified that he would not have written those notes if in fact the 1990 Agreement was not executed by the Corporation. (APP. 124, 478). Finally, Louis Bossio's Last Will and Testament made specific bequests of Italian china and real estate unrelated to the Corporation to Respondent, Antoinette Bossio Summers, and his wife. (APP. 320-331, 475; Estate Ex. 3). The Will did not mention his shares of stock in the Corporation, which were the largest asset of his estate. (*Id.*).

Similar to his testimony regarding the 1982 Agreement, Petitioner Bossio did not recall signing the 1990 Agreement but testified that he "can't rule it out" when asked if he did in fact sign it. (APP. 159, 167). He again testified that he did not get involved in the Corporation's legal details and minutia. (APP. 160-161, 166-167). As with the 1982 Agreement, he testified that he never even looked for the signed 1990 Agreement during the course of this litigation, even though it was requested in discovery. (APP. 169). Similarly, Petitioner Estate was not involved and had no knowledge whatsoever regarding the 1982 or 1990 Agreement. (APP. 178, 183).

D. Judge Clawges finds that the Corporation signed the Agreement in 1982 and also executed a revised Agreement in 1990.

The Circuit Court heard testimony and took evidence on whether the 1982 and/or 1990

Agreement were executed and binding on the Corporation during a nonjury trial on March 4, 2014. (APP. 474-480). In a seven (7) page Trial/Judgment Opinion Order (the "Order"), supported by the record evidence, Judge Clawges found that Respondent proved that the shareholders "intended to enter into an arrangement where upon the death of one of the shareholders of [the Corporation], the Corporation would purchase the stock of the deceased shareholder." (APP. 480). The Court further found that the 1982 Agreement was executed and remained in effect until the Agreement was revised in 1990. (*Id.*). Accordingly, the Circuit Court ordered that the Agreement was valid and binding, and that the terms and substance of the Agreement were set forth in Respondent's Exhibit Number Two admitted at trial. (*Id.*).

In response to Petitioner Estate's request for clarification, the Circuit Court entered an Amended Order on September 5, 2014 to even more explicitly find that the:

> 1982 Agreement was superseded by a 1990 Agreement of the parties, and that the basic difference between the 1982 Agreement and the 1990 Agreement was the fact that the 1982 Agreement required life insurance and had a provision for what would happen if the life insurance was not maintained. The Court further finds that the 1990 Agreement removed the requirement for life insurance and, therefore, would have removed any consequences of not having life insurance. In fact, it is the Court's opinion that the purpose of the 1990 Agreement was to make the life insurance modification of the 1982 Agreement, and to basically keep the 1982 Agreement in place otherwise.

(APP. 531-532).

III. SUMMARY OF THE ARGUMENT

Following a nonjury trial, the Circuit Court held that the shareholders of the Corporation signed the 1982 Agreement, which was subsequently revised and executed again in 1990. Dissatisfied with the outcome, Petitioners ask this Court to reexamine the evidence on appeal and reach a different result. However, the Circuit Court applied the correct legal standard and its findings are explicitly stated in the Order and Amended Order. The Court heard testimony from

all of the parties and detailed the evidence it relied upon in support of its decision.

While Petitioners' Briefs claim that Respondent did not satisfy his burden at trial, they fail to cite to a single case, whether from a West Virginia court or someplace else, where a party offered such overwhelming evidence that a lost document did exist and should be enforced. Because the Circuit Court did not abuse its discretion or commit clear error, this Court must affirm.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners have requested oral argument pursuant to Rule 19. Respondent respectfully submits that oral argument is not necessary because the dispositive issues have been authoritatively decided in a thorough Order and Amended Order setting forth detailed findings of fact and conclusions of law. Both Petitioners and Respondent are represented by competent counsel, and the facts and legal arguments are adequately presented in the briefs and record on appeal. To the extent this Court deems oral argument would significantly aid the decisional process, Respondent would be honored to appear and defend the issuance of the Order and Amended Order from Judge Clawges of the Monongalia County Circuit Court.

V. ARGUMENT

A. Standard of Review

"In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to *de novo* review." Syl. Pt. 1, *Public Citizen, Inc. v. First Natl. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996). Clear error exists only when "the reviewing court on the

entire evidence is left with the definite and firm conviction that a mistake has been committed." *Public Citizen*, 198 W.Va. at 334, 480 S.E.2d at 543 (quoting *Board of Educ. v. Wirt*, 192 W.Va. 568, 579, n. 14, 453 S.E.2d 402, 413, n. 14 (1994)).

"Of course, if the trial court's findings of fact are not clearly erroneous and the correct legal standard is applied, its ultimate ruling will be affirmed as a matter of law." *Phillips v. Fox*, 193 W.Va. 657, 662, 458 S.E.2d 327, 332 (1995). "[T]his Court may not overturn a finding simply because it would have decided the case differently, and this Court must affirm 'if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.'" *Francis v. Bryson*, 217 W.Va. 432, 436, 618 S.E.2d 441, 445 (2005) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-574 (1985)).

B. <u>The Circuit Court did not abuse its discretion or commit clear error when it found that the Stock Purchase Agreement was valid and binding upon all the parties.</u>

This Court will not reverse unless it determines that Judge Clawges abused his discretion or committed clear error. Because the trial court relied upon the evidence submitted and utilized the correct legal standard in reaching its decision, this Court must affirm.

1. <u>The Circuit Court applied the correct legal standard</u>.

As stated in the Circuit Court's opinion, "a high degree of proof from one seeking to establish a lost instrument is required." *Marshall v. Elmo Greer & Sons, Inc.*, 193 W.Va. 427, 429, 456 S.E.2d 554, 556 (1995). "When it is shown that an original writing containing facts relevant to the issues in a case is lost or destroyed, secondary evidence of its contents is admissible." Syl. Pt. 1, *Belknap v. Cline*, 190 W.Va. 590, 439 S.E.2d 455 (1993); Syl. Pt. 1, *State ex rel. Alderson v. Holbert*, 137 W.Va. 883, 74 S.E.2d 772 (1953).

The Circuit Court without question applied the correct legal standard, and Petitioners' Briefs do not claim otherwise as both point to <u>Marshall</u> as the correct standard to apply. (*See*

Petitioner Estate's Brief, p. 19-20; Petitioner Bossio's Brief, p. 18). The Marshall case is cited by the trial court in its Trial/Judgment Opinion Order (the "Order"). (APP. 479). Recognizing that the lower court used the right standard, Petitioners assert that Respondent failed to submit enough evidence to meet his burden of proof. The burden, however, was adequately recited in the findings and briefs submitted by the parties to the trial court (APP. 343-473), and the Circuit Court found that Respondent sustained his burden after applying the facts presented to it at trial under the correct standard of law.

The West Virginia Rules of Evidence provide that an original writing is not required and other evidence of its contents "is admissible if – (1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." *See* W. Va. R.E. 1004(1).[3] "When it is shown that an original writing containing facts relevant to the issues in a case is lost or destroyed, secondary evidence of its contents is admissible." Syl. Pt. 1, *Belknap*, 190 W.Va. at 590; 439 S.E.2d at 455; Syl. Pt. 1, *Holbert*, 137 W.Va. at 883, 74 S.E.2d at 772. The existence of a lost document must be shown by clear and convincing evidence. *Crigler v. Lukens*, 120 W.Va. 695, 200 S.E. 60, 71 (1938).

Despite this heightened burden, numerous West Virginia courts have found that proponents of lost documents have sufficiently proven their existence and terms. *See Morrison v. Judy*, 123 W.Va. 200, 13 S.E.2d 751 (1941) (testimony sufficient to prove existence of lost promissory note); *Miller v. Estabrook*, 273 F. 143 (4th Cir. 1921) (testimony and abstract of title sufficient to prove lost deed); *Linn v. Collins*, 77 W.Va. 592, 87 S.E. 934 (1916) (testimony and evidence of signed deed sufficient to prove existence of lost note); *Ohio River R.R. Co. v. Sehon*, 33 W.Va. 559, 11 S.E. 18 (1890) (testimony sufficient to prove existence of lost contract).

Foreign authority follows the same rule as West Virginia in regards to proving lost

[3] Petitioners have not suggested that Respondent lost or destroyed the Agreement.

documents. "In cases where the loss or destruction of documents has been demonstrated, including a diligent search and inquiry for the missing document, secondary evidence may be used to establish the contents of the instrument, provided the evidence is otherwise competent and admissible." *See* 52 Am Jr. 2d Lost and Destroyed Instruments § 12.

Similar to West Virginia courts, other courts have held that secondary evidence is admissible to prove the contents of a lost instrument. *See Burt Rigid Box, Inc. v. Travelers Property Cas. Corp.*, 302 F.3d 83 (2nd Cir. 2002) (lost insurance policy proven through testimony and business records listing the policy number); *Dart Inds., Inc. v. Commercial Union Ins. Co.*, 124 Cal.Rptr.2d 142 (Cal. 2002) (secondary evidence, through direct testimony and documents, sufficient to prove lost insurance policy); *Roberson v. Ocwen Federal Bank FSB*, 553 S.E.2d 162 (Ga. App. Ct. 2001) (testimony and secondary evidence sufficient to prove existence of lost agreement); *Klein v. Frank*, 534 F.2d 1104 (5th Cir. 1976) (testimony is sufficient to prove lost contract); *Robinson v. Thornton*, 76 Cal.Rptr. 835 (Cal. 1969) (testimony of proponent sufficient to prove existence of lost contract); *Smith v. Lurty*, 108 Va. 799, 62 S.E. 789 (Va. 1908) (old letters and testimony sufficient to prove execution and delivery of lost deed); *Banks v. Mitsubishi Motors Credit of America, Inc.*, 435 F.3d 538 (5th Cir. 2005) (affidavit stating that customers signed arbitration agreement was sufficient to prove contents of lost agreement when customers failed to produce any contradictory evidence).

In Burt, the insured brought suit against the insurance company claiming that he was covered by insurance policies that had been lost. *Burt Rigid Box, Inc. v. Travelers Property Cas. Corp.*, 302 F.3d 83, 85 (2nd Cir. 2002). In support of the policies' existence, the insured offered testimony, submitted business records listing the policy numbers, and produced financial records indicating that premiums were paid on the policies. *Id.* at 92-93. The insurance company failed

to produce any contradictory evidence other than the fact that the policies could not be located. *Id.* at 93. Accordingly, the Court held that the insured had offered clear and convincing secondary evidence of the insurance policies' terms and existence. *Id.*

Similarly, in Smith, which Petitioner Estate somehow cites in support of its position (*see* p. 22), the proponent of a lost deed submitted old letters and testimony from the deed's drafter and non-parties to prove the existence of the lost instrument. *Smith v. Lurty*, 108 Va. 799, 62 S.E. 789, 790 (Va. 1908). The court acknowledged that "[g]enerally the loss of an instrument can only be established by circumstantial evidence." *Id.* at 791. It also stated that the burden of proof of loss is lower when the proponent of the missing instrument has no motive to allege its loss. *Id.* Therefore, the Court found that the proponent of the deed had proven its existence and validity through circumstantial evidence. *Id.* at 792.

Like the plaintiffs in Burt and Smith, Respondent offered direct testimony and a plethora of evidence demonstrating that the Corporation signed both the 1982 and 1990 Agreement. On the other hand, Petitioners offered no evidence whatsoever that the Agreements were not executed.

2. Respondent proved the validity and execution of the 1982 Agreement.

The Circuit Court enumerated the evidence it relied upon in finding that Respondent proved the validity and execution of the 1982 Agreement. (APP. 474-480). The trial court's account of the evidence is more than plausible, and no clear error was committed.

Respondent submitted substantial evidence proving the execution and existence of the 1982 Agreement. The 1982 Agreement was drafted by Attorney David Straface. (APP. 048, 476). Respondent testified that the 1982 Agreement was signed by Respondent, Petitioner Bossio, and Luigi Bossio at the Corporation's offices. (APP. 046-047, 476). After the 1982

Agreement was signed, it was placed in a manila folder that had the words "Buy-Sell Agreement" written on the tab and placed in the company safe. (APP. 059, 285, 476-477, Respondent Ex. 8). Joseph Marshalek ("Mr. Marshalek"), a disinterested witness and certified public accountant employed by the Corporation, also testified that the 1982 Agreement was signed by the Corporation's shareholders in the fall of 1982. (APP. 111-112, 128, 130, 476).[4]

Mr. Marshalek further testified that the "Buy-Sell Agreement" handwriting on the manila folder was his, and that he would have placed the executed 1982 Agreement into that folder. (APP. 116, 285, 476-477; Respondent Ex. 8). The 1982 Agreement itself also had handwritten notes on it, which Mr. Marshalek identified as his as well. (APP. 108, 197-208; Respondent Ex. 2). He stated that those notes were his review notes for points of clarification or discussion with the Corporation's shareholders. (APP. 109). Respondent testified that, aside from changing the address, the 1982 Agreement introduced into evidence at trial was the agreement signed by all the shareholders in 1982. (APP. 048, 197-208; Respondent Ex. 2).

In addition to Respondent and Mr. Marshalek's testimony, Respondent also produced secondary evidence proving the execution and existence of the 1982 Agreement. (APP. 197-208; Respondent Ex. 2). First, the manila folder itself indicates the execution of the 1982 Agreement. (APP. 285; Respondent Ex. 8). Second, the 1982 Agreement required the Corporation to purchase $100,000 life insurance policies on the lives of all three (3) shareholders. (APP. 199-201, 475-477; Respondent Ex. 2). The 1982 Agreement contained a "Schedule of Life Insurance Policies," and the Schedule indicated that the policies would be purchased through Equitable. (APP 208; Respondent Ex. 2). The 1982 Agreement listed specific policy numbers for

[4] "The lower court heard the evidence presented by the opposing parties in the present case and was in a position to make credibility determinations that must be accorded deference." *Francis v. Bryson*, 217 W.Va. 432, 436, 618 S.E.2d 441, 445 (2005). Witness credibility cannot be assessed by a reviewing court through a record. *Id.* (citing *Michael D.C. v. Wanda L.C.*, 201 W.Va. 381, 388, 497 S.E.2d 531, 538 (1997)).

Respondent (82-396-966), Petitioner Bossio (82-396-435, and Luigi Bossio (82-395-874). (*Id.*; APP. 475). Respondent, Petitioner Bossio, and Mr. Marshalek all testified that those policies were in fact purchased by the Corporation. (APP. 054-055, 113-115, 164-165).

Third, the Corporation made its first payment on the Equitable life insurance policies in the last quarter of 1982. (APP. 113-114, 477). Policy statements from Equitable were admitted as evidence showing that Luigi Bossio's policy was purchased on September 30, 1982, and Petitioner Bossio's policy was purchased by October 1, 1982. (APP 209-214; Respondent Ex. 3). Additional policy statements from Equitable were admitted demonstrating that the Corporation purchased the exact life insurance policies with the same policy numbers as listed in the 1982 Agreement. (APP. 209-253, 477; Respondent Ex. 3). On September 26, 1990, Mr. Marshalek wrote a letter to Equitable to advise that all three (3) policies had become paid-up policies. (APP. 251, 477; Respondent Ex. 3).

Fourth, Mr. Marshalek testified that the insurance was paid for on a monthly basis to fund the Corporation's buy-sell arrangement. (APP. 113, 126). The life insurance premiums were not deductible by the Corporation and were treated as a reconciling item on the Corporation's tax returns from 1982 through, at least, 1989. (APP. 114, 126-127). Further demonstrating that the shareholders intended to convey the deceased shareholder's interest back to the Corporation, the Corporation deeded all of its real property into the Corporation's name and the shareholders' spouses, including Luigi Bossio's wife, disclaimed their respective interests in the property. (APP. 290-294; Respondent Ex. 11).

Conversely, Petitioner Bossio testified that it was possible that he signed the 1982 Agreement. (APP. 163). While he did not have a specific recollection, he did admit that he could have signed it. (*Id.*). Even though requested in discovery and the main point in this

lawsuit, Petitioner Bossio testified that he has never even looked for the signed 1982 Agreement. (APP. 169). Likewise, Petitioner Estate had no involvement with the Corporation or knowledge either way concerning the execution of the 1982 Agreement. (APP. 178, 183).

In sum, Respondent offered an abundance of direct and secondary evidence proving the validity and execution of the 1982 Agreement. The Circuit Court detailed its findings in its opinion, applied the correct legal standard, and ruled in Respondent's favor. Petitioners' disagreement with Judge Clawges' ruling is not a ground to reverse, especially when Petitioners offered no evidence whatsoever demonstrating that the 1982 Agreement was not in effect. *See Banks v. Mitsubishi Motors Credit of America, Inc.*, 435 F.3d 538 (5th Cir. 2005) (affidavit offered by proponent of lost document stating that customers signed arbitration agreement was sufficient to prove contents of lost agreement when opponent failed to produce any contradictory evidence). Accordingly, this Court must affirm.

3. Respondent proved the validity and execution of the 1990 Agreement.

Again, the Circuit Court enumerated the evidence it relied upon in finding that Respondent proved that the shareholders signed the 1982 Agreement and also executed a revised Agreement in 1990. (APP. 474-480). The ruling should be affirmed as the trial court's account of the evidence is more than plausible and no clear error was committed.

Respondent testified that the 1990 Agreement was executed by Respondent and Petitioner Bossio in the Corporation's offices at 12 Monongahela Avenue in October 1990. (APP. 063-064; Respondent Ex. 6). Luigi Bossio then signed the 1990 Agreement at the basement dining room table in his home. (APP. 064, 478). The signed 1982 and 1990 Agreement were then placed in the manila folder with the words "Buy-Sell Agreement" written on it and placed in the Corporation's safe located in the company's office. (APP. 064, 285, 478;

Respondent Ex. 8). When Respondent went to retrieve the signed Agreements after the lawsuit was filed, they were gone and the only thing that remained was the empty manila folder with the words "Buy-Sell Agreement" on it. (APP. 068, 479, Respondent Ex. 8).[5]

Attorney David Straface ("Attorney Straface") testified that he revised the Corporation's 1982 Agreement in 1990. (APP. 136). His handwritten notes on the 1990 Agreement indicated that he absolutely revised it for the Corporation. (APP. 136, 272-283; Respondent Ex. 6). While he did not receive a signed copy back, he testified "that was not unusual" as his firm did a lot of work for the Corporation in the late 1980s and early 1990s. (APP. 134-135, 137, 478). He also testified that he had no reason to believe that the 1990 Agreement was not signed by the Corporation's shareholders. (APP. 137).

In addition to testimony, the Circuit Court referred to additional pieces of documentary evidence in finding that the 1990 Agreement was valid and executed. (APP. 474-480). Both the 1982 and 1990 Agreement required the Corporation's stock certificates to be endorsed with this language:

> This certificate is transferable only upon compliance with the provisions of an agreement dated _____, 19__ among Bossio Enterprises, Inc., Louis Bossio, Sam Bossio and Bernard Bossio, a copy of which is on file in the Office of the Secretary of the Corporation.

(APP. 201-202, 276-277; Respondent Exs. 2 and 6 at Section 6).

Introduced into evidence were the Corporation's stock certificates issued to Respondent, Petitioner Bossio, and Luigi Bossio. (APP. 266-271, 478; Respondent Ex. 5). On the back of each stock certificate, the following endorsement is typewritten:

> This certificate is transferable only upon compliance with the provisions of an agreement dated 10-1-90, among Bossio Enterprises, Inc., Louis Bossio, Sam Bossio and Bernard Bossio, a copy of which is on file in the

[5] Petitioners offered no evidence or even suggested that Respondent lost the Agreement. Petitioner Bossio testified that many people had access to the safe over the years, including him. (APP. 163).

Office of the Secretary of the Corporation.

(APP. 266-271, 478; Respondent Ex. 5). The Corporation's stock certificates were endorsed with the exact same language as required by the 1982 and 1990 Agreement. (APP. 266-283, 478; Respondent Exs. 5 and 6). After Petitioner Bossio produced in discovery just the fronts of the certificates on two (2) different occasions, the fronts and backs of the stock certificates (with the endorsements) were eventually produced by Petitioner Bossio during this lawsuit. (APP. 068-069, 479; Respondent Ex. 5).

In addition to the endorsed stock certificates, the trial court relied on more evidence to support its findings. (APP. 474-480). First, the October 1990 Stock Redemption Agreement for a related Bossio entity (BHM Development) contains identical substantive language to the Corporation's 1990 Agreement. (*Compare* APP. 197-208, 254-265; Respondent Ex. 2 and 4). Second, Attorney Straface's notes from Respondent's divorce in 1991 reference the existence of the 1990 Agreement. (APP. 138-139, 284, 478-479; Respondent Ex. 7). Attorney Straface testified that those notes referred to the existence of the 1990 Agreement. (APP. 139, 479). Third, on October 17, 1991, the attorney for Respondent's former wife requested the 1990 Agreement in discovery during the divorce proceedings. (APP. 140, 288-289, 479; Respondent Ex. 10). Fourth, Mr. Marshalek assisted Respondent in valuing his shares during the divorce. (APP. 106, 123, 478). Mr. Marshalek's handwritten notes, dated September 24, 1991, refer to the "Buy Sell 100,000 for BB, Sam & Louis." (APP. 123, 286-287, 478; Respondent Ex. 9). Mr. Marshalek testified that he would not have written those notes if in fact the 1990 Agreement did not exist. (APP. 124, 478). Finally, while the Last Will and Testament of Luigi Bossio makes specific bequests to certain family members, his Will does not even mention the shares of stock in the Corporation, his biggest asset. (APP. 320-331, 475, Estate Ex. 3).

Once again, Petitioners offered no evidence that the 1990 Agreement was not signed. While Petitioner Bossio did not recall signing the 1990 Agreement, he testified that he "can't rule it out." (APP. 159, 167). He also testified that he did not get involved in the legal details and minutia of the Corporation. (APP. 160-161, 166-167). Similarly, Petitioner Estate was not involved with the Corporation and had no knowledge either way concerning the Agreements. (APP. 178, 183).

As with the 1982 Agreement, the trial court detailed the considerable direct and secondary evidence submitted by Respondent to prove the validity and execution of the 1990 Agreement. The Circuit Court's findings were laid out in its Order and the correct legal standard was applied. Therefore, this Court must affirm.

4. Petitioners offered no evidence to the contrary.

As detailed herein, Petitioners offered no evidence to show that the 1982 or 1990 Agreement was not signed or valid. Petitioner Bossio could not rule out that he signed the Agreement and admitted that he never even looked for the signed versions even though they are the focus of this case. (APP. 169). Given the ample evidence relied upon by the trial court and Petitioners' failure to offer any rebuttal, this Court should affirm.

Faced with this incurable fact, Petitioners argue that Respondent did not satisfy his burden at trial. However, they fail to cite to a single case where a party offered such overwhelming evidence that a lost document did exist. Rather, both Petitioners rely on *Marshall v. Elmo Greer & Sons, Inc.*, 193 W.Va. 427, 456 S.E.2d 554 (W. Va. 1995) to support their claim that Respondent failed to sustain his burden of proof. Marshall is easily distinguishable.

In Marshall, the plaintiff was a subcontractor on a construction project for the West Virginia Department of Highways. *Id.* at 428. Under the written four-page contract, the general

contractor agreed to pay $236,955.00 for certain work to be performed by the plaintiff. *Id.* at 428-429. The plaintiff claimed that there was a missing coversheet to the written contract that contained additional financial terms. *Id.* at 429. The Court rejected plaintiff's lost document allegation because it was "not creditable." *Id.* In support of its ruling, the Court also relied upon the written contract's merger clause, and the fact that plaintiff offered no other evidence giving factual support to his claim that the written contract had a missing coversheet. *Id.* at 429 and 431.

Nowhere in Marshall does the court hold that a proponent of a lost instrument must prove the exact contents of the document. Rather, Marshall found that the plaintiff failed to prove the existence of the missing coversheet based on plaintiff's credibility and the fact that no other supporting evidence was offered to support its existence.

Unlike the plaintiff in Marshall, Respondent has offered substantial direct and secondary evidence that both the 1982 and 1990 Agreements were signed by the shareholders of the Corporation. The Circuit Court agreed and detailed its findings under the correct legal standard. As a result, this Court must affirm.

C. Petitioners have waived arguments related to the insurance provisions.

The Circuit Court found that the terms of the 1990 Agreement were identical to the 1982 Agreement with the exception of the requirement that the Corporation purchase policies of life insurance on the shareholders. (APP. 480). For the the first time on appeal, Petitioner Bossio argues that this finding is reversible error. (*See* Petitioner Bossio's Brief, p. 25-28). In similar fashion, Petitioner Estate also argues for the first time on appeal that this finding is clear error because the Circuit Court misapplied contract interpretation law. (*See* Petitioner Estate's Brief, p. 28-39). Because these arguments were not raised below, this Court should find them waived.

When arguments are raised for the first time on appeal, "we must necessarily find that the argument has been waived." *Zaleski v. W. Va. Mut. Ins. Co.*, 224 W.Va. 544, 550, 687 S.E.2d 123, 129 (2009) (per curiam). "We have frequently held that issues which do not relate to jurisdictional matters and which have not been raised before the circuit court will not be considered for the first time on appeal by this Court." *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W.Va. 570, 585, 490 S.E.2d 657, 672 (1997).

In this case, Petitioner Bossio never raised any issues concerning the insurance requirements contained in the 1982 Agreement, or the fact that the insurance obligations were removed in the 1990 Agreement. His issues with the lower court's interpretation of those obligations were not raised at trial (APP. 026-191) and were never raised in any pleadings, motions, or responses submitted to the trial court. (*See* APP. 343-360, 481-494). Accordingly, they have been waived and should not be considered by this Court.

Petitioner Estate, unlike Petitioner Bossio, did raise below that the Agreements terminated when the life insurance policies were cancelled. (APP. 367-368, 470-471). However, on appeal, Petitioner Estate raises a variety of new, alternative, and at times conflicting arguments based on contract interpretation law, entire contracts, inseverable and severable contracts. (*See* Petitioner Estate's Brief, p. 28-39). Because those arguments are new and were never submitted to the trial court, this Court should not consider them on appeal and find them waived.

D. <u>In the absence of waiver, the Circuit Court did not abuse its discretion or commit clear error when it held that the 1990 Agreement removed the mandatory life insurance provision</u>.

The Circuit Court held that the Agreement was revised in 1990, and its terms were identical to the 1982 Agreement "with the exception of the requirement that the Corporation

purchase policies of life insurance on the life of each shareholder." (APP. 480). When Petitioner Estate asked for additional clarification, the Circuit Court even more clearly held that "the basic difference between the 1982 Agreement and the 1990 Agreement was the fact that the 1982 Agreement required life insurance and had a provision for what would happen if the life insurance was not maintained." (APP. 531). The 1990 Agreement removed the requirement for life insurance. (*Id.*).

Judge Clawges obviously accepted Respondent's testimony that the only changes between the 1982 Agreement and the 1990 Agreement were the dates and the conversion of the life insurance provisions (Section 3) from a mandatory requirement to a discretionary one. (APP. 063, 199, 480, 531-532). This credibility determination is solely within the trial court's province, and it "was in a position to make credibility determinations that must be accorded deference." *Francis v. Bryson*, 217 W.Va. 432, 436, 618 S.E.2d 441, 445 (2005). Witness credibility cannot be assessed by a reviewing court through a record. *Id.* (citing *Michael D.C. v. Wanda L.C.*, 201 W.Va. 381, 388, 497 S.E.2d 531, 538 (1997)).

In addition to Respondent's testimony, Section 4 of the BHM Agreement (APP. 258) is substantively identical to the Corporation's 1990 Agreement and provides that the Corporation may procure policies of life insurance on the shareholders. (APP. 258; Respondent Ex. 4). This also supports the trial court's finding that the 1990 Agreement converted the purchase of life insurance from mandatory to optional.

The life insurance policies also became paid-up policies as of September 26, 1990. (APP. 251). The Corporation later borrowed against the policies for operating cash. (APP. 056). The policies did not terminate for nonpayment until June 25, 1996, and with respect to Luigi Bossio, evidence was admitted showing that his policy had a net cash surrender value of

$2,936.04 when it lapsed. (APP. 252). It is also undisputed that the policies were cancelled for lack of payment, and it was Petitioner Bossio who was responsible for the Company's accounting at that time. (APP. 156).

Additional evidence was also admitted before the trial court to show that the 1990 Agreement was in effect, such as the endorsements on the stock certificates (APP. 266-271; Respondent Ex. 5), Attorney Straface's notes (APP. 138-139, 284, 478-479; Respondent Ex. 7), the request for the 1990 Agreement in Respondent's 1991 divorce proceedings (APP. 140, 479; Respondent Ex. 10), and Mr. Marshalek's notes dated September 24, 1991 (APP. 123, 286-287; Respondent Ex. 9). Because this finding of fact is clearly not erroneous and the correct legal standard was applied, this Court should affirm as a matter of law.

E. In the absence of waiver, the Circuit Court did not abuse its discretion or commit clear error when it held that the 1990 Agreement did not terminate when the life insurance policies were cancelled.

Both Petitioners make the unsound argument that the lower court erred by finding that the Agreement did not terminate when the policies were cancelled. Because the lower court found that the 1990 Agreement removed the requirement of mandatory purchase of life insurance, it also held that the 1990 Agreement "would have removed any consequences of not having life insurance." (APP. 531-532). This is the correct and most natural reading of the Agreement.

Simply stated, it makes no sense that the 1990 Agreement would make the purchase of life insurance optional, and then terminate itself if life insurance was not purchased. Rather, the lower court properly found that making life insurance optional would have removed any consequences of not having it. (*Id.*) This is exactly how the BHM Agreement was drafted and executed. (APP. 254-265; Respondent Ex. 4).

Petitioner Estate's Brief outlines various new, alternative, and often conflicting

interpretations of how the 1990 Agreement should have been read by the lower court. It also offers reasons and submits theories and intentions not found within the evidence of record.[6] Petitioner Estate's wide-ranging interpretations ignore the most natural and logical reading of the Agreement, which is how the lower court construed the Agreement.

"A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syl. Pt. 1, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962). "The mere fact that the parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." Syl. Pt. 1, *Berkeley County Public Serv. Dist. v. Vitro Corp. of America*, 152 W.Va. 252, 162 S.E.2d 189 (1968). Moreover, self-serving assertions without factual support in the record are not considered by this Court. *Brewer v. Hosp. Management Assocs., Inc.*, 202 W.Va. 163, 167, 503 S.E.2d 17, 21 (1998).

Petitioner Estate's convoluted theories as to how the Agreement should have been interpreted were never presented to the trial court and are not supported by the evidence of record. Petitioner Estate claims that the trial court should have considered the financial circumstances facing the Corporation and that having to purchase a deceased shareholder's stock would have driven the Corporation into insolvency at that time. (*See* Petitioner Estate's Brief, p. 34-36). First, there is no record evidence that the Corporation would have went bankrupt if it had to purchase a deceased shareholder's shares. Second, this interpretation ignores the fact that the Agreement contained a mechanism that called for the valuation of shares at the date of a shareholder's death. (APP. 198-199; Respondent Ex. 2 at Section 2). If the Corporation truly

[6] For example, Petitioners' Brief claims that the Agreement "required an initial down payment of twenty percent of the Corporation's value to the surviving spouse." (*See* Petitioners' Brief, p. 6 and 34). There simply is no such requirement in the text of the Agreement. (*See* APP. 197-208; Respondent Ex. 2).

did have financial troubles and the shares were of little value, then the price of the shares would have been reduced accordingly.

Petitioner Estate also claims that the Court failed to consider the intent of the parties, and that the intent was "designed to keep the assets in the family" and not allow the shares to "fall into the hands of Respondent's spouse or [Petitioner] Bossio's spouse..." (*See* Petitioner Estate's Brief, p. 38-39). First, this argument ignores the trial court's finding that "the purpose of the 1990 Agreement was to make the life insurance modification of the 1982 Agreement, and to basically keep the 1982 Agreement in place otherwise." (APP. 531-532). Second, there is no record evidence to support this contention of Petitioner Estate and self-serving assertions without factual support should not be considered by this Court. Third, the record evidence was that one of the purposes of the Agreement was because the shareholders "did not want to have to deal with a spouse or the people that would inherit the stock." (APP. 049). Fourth, the Estate's after-the-fact argument regarding intent is contrary to the 1988 Deed, which conveyed the real property into the Corporation and the shareholder's spouses expressly disclaimed any interest that they may have had, which included any interest of Louis Bossio's wife. (APP. 290-294; Respondent Ex. 11).

Because the trial court's findings are clearly not erroneous and the correct legal standard was applied, this Court should affirm as a matter of law.

VI. CONCLUSION

The Circuit Court properly found that the shareholders of the Corporation signed the Agreement in 1982 and also executed a revised Agreement in 1990. Because the Circuit Court did not abuse its discretion or commit clear error, this Court must affirm the Circuit Court's Trial/Judgment Opinion Order and Amended Order.

Respectfully submitted,

Dated: May 15, 2015

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 14-1328 and Docket No. 14-1329
(Consolidated)

Estate of Luigi Bossio a/k/a Louis Bossio,
Defendant Below, Petitioner,

vs.) No. 14-1328

Bernard V. Bossio, Plaintiff Below, Respondent.

AND

Sam Bossio, Defendant Below, Petitioner,

vs.) No. 14-1329

Bernard V. Bossio, Plaintiff Below, Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2015 the foregoing **RESPONDENT'S BRIEF** was served by United States First Class Mail, postage prepaid, upon the following counsel of record:

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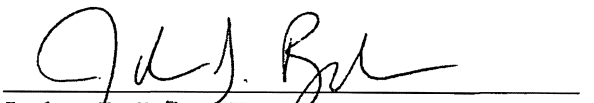

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